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In the

Supreme Court of the United States

October Term, 1984

GAIL PAPPALARDI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**BRIEF IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI**

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COUNTER-QUESTION PRESENTED

1. Is the propriety of a summation comment which is well-grounded in the evidence an "important" question under Rule 17.1(c) of this Court?



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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 84-721

GAIL PAPPALARDI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to
the Appellate Division, First Department
of the Supreme Court of the State of New York

PRELIMINARY STATEMENT

On October 12, 1983, petitioner Gail Pappalardi was convicted in the Supreme Court, New York County (James J. Leff, J.), after a jury trial, of Criminally Negligent Homicide (New York Penal Law §125.10). Petitioner was



sentenced to a term of one and one-third to four years imprisonment, which she is now serving. By an order dated June 28, 1984, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment of conviction. People v. Pappalardi, 102 A.D.2d 1016. On September 10, 1984, leave to appeal to the New York Court of Appeals was denied. People v. Pappalardi, 63 N.Y.2d 777.

Petitioner now seeks a writ of certiorari to review the order of the Appellate Division, First Department.

STATEMENT OF THE CASE

The Crime

During the early morning hours of April 17, 1983, Felix Pappalardi, a well-known figure in the world of rock music, was shot to death in the bedroom of his Manhattan

apartment. A single bullet entered his neck and pierced his carotid artery. When the police arrived, Pappalardi's wife, petitioner Gail Pappalardi, told them that she had fired the shot. Petitioner also directed the police to the murder weapon, a Derringer, which was on a table in an adjacent room. Approximately one week later, petitioner was indicted for Murder in the Second Degree under a theory of intentional murder.

The 911 Calls

Following the shooting, petitioner called the police emergency number, 911. During the course of that call petitioner told the 911 operator that the shooting had been accidental. Petitioner also stated at one point: "I must call my lawyer". In a return call placed by the 911 operator a few minutes



later, petitioner reiterated that she had not intended to shoot her husband.

The Trial

There was no dispute at trial that the fatal shot had been fired from the Derringer. The principal evidence supporting the intentional murder charge was petitioner's admission to the police that she had shot her husband. The tape recordings of the 911 calls also were admitted into evidence. In her summation, the prosecutor argued among other things that the timing of petitioner's statement to the 911 operator about her lawyer evinced petitioner's consciousness of guilt.

Petitioner took the stand in her own defense, admitting that she had been holding the Derringer just before it went off, but denying that she had ever aimed the gun at



Pappalardi. She offered no explanation of how the gun discharged other than to suggest that she might have been distracted by something. Over defense counsel's objection, the trial judge submitted a number of lesser included offenses to the jury, including Criminally Negligent Homicide.

The State Appeal

In her briefs filed in the Appellate Division, First Department, petitioner contended in part that the prosecutor's comment in summation concerning the "I must call my lawyer" statement violated her Sixth Amendment right to counsel. As noted, the court affirmed petitioner's judgment of conviction without opinion.



REASONS FOR DENYING THE WRIT

1. Petitioner renews the claim that her Sixth Amendment right to counsel was violated when the prosecutor referred in summation to petitioner's "I must call my lawyer" statement to the 911 operator. The disputed passage in the summation reads as follows:

"According to her [petitioner's] testimony, the first thing she thinks of, in the course of speaking to 911, after telling them what the problem is, -- I have to call my lawyer. Why? She knew what she had done, and she knew that she needed to get in touch with somebody who could give her legal advice"*.

Petitioner's assertions notwithstanding, this claim is hardly an "important question" in need of resolution by this Court. See U.S. Sup. Ct. Rule 17.1(c), 28 U.S.C.A.

*Defense counsel's subsequent objection to this comment was overruled.



Respondent has never denied that a comment on a defendant's exercise of his Sixth Amendment rights might be improper; rather, respondent argued in state court that the above comment did not focus on petitioner's Sixth Amendment rights. The issue presented here, therefore, is merely the factual interpretation of this particular comment. Of course, such a factual interpretation is not an issue which this Court need address.

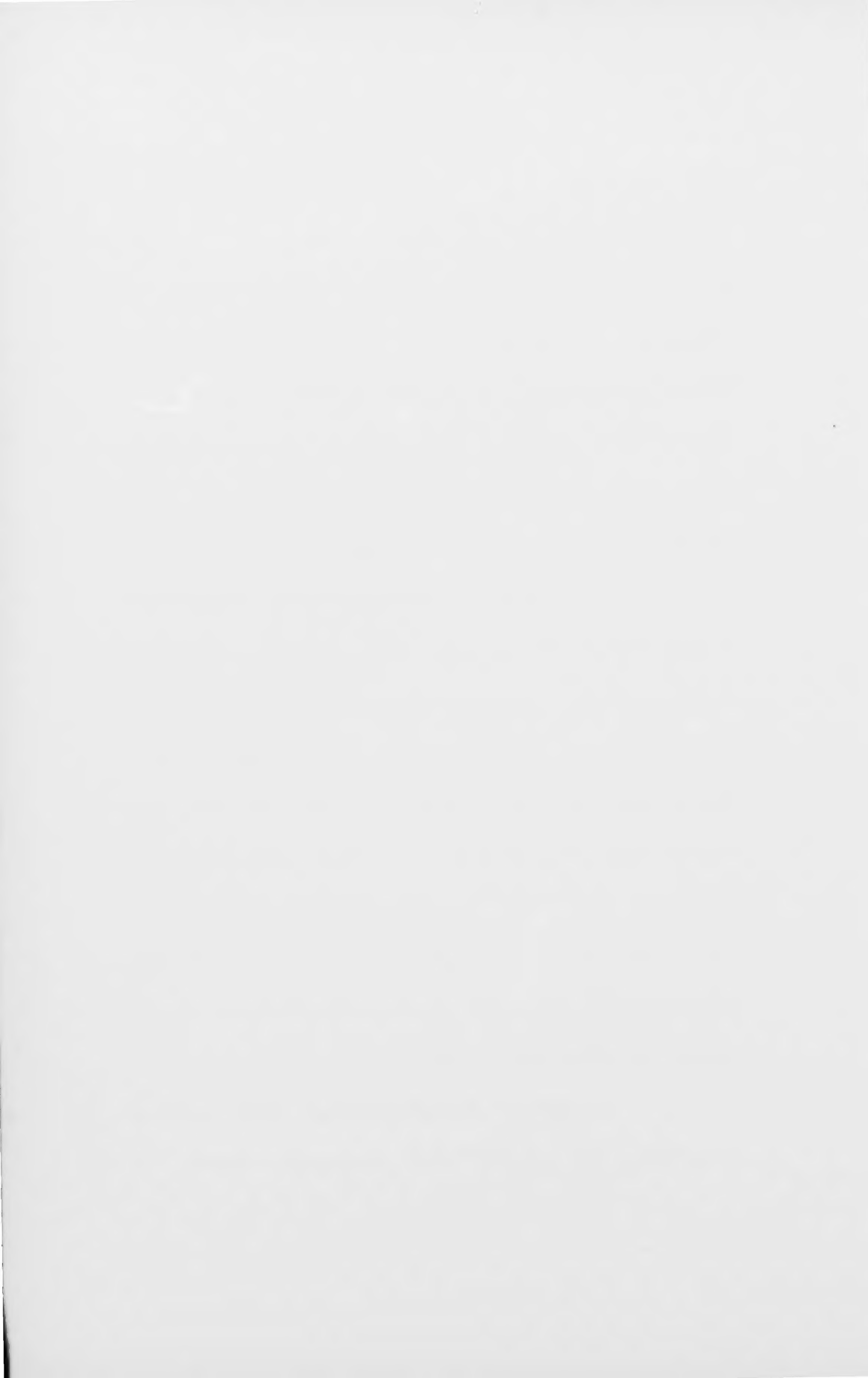
2. Review is not called for in any event because the state courts reached the correct result. As respondent argued below, the prosecutor's comment merely discussed evidence in the record and did not violate petitioner's rights.

Beyond any question, a prosecutor is entitled to draw fair inferences from the evidence adduced at trial. See, e.g., United States v. Suarez, 588 F.2d 352 (2d Cir. 1978). At the time petitioner made the "I must call my lawyer" statement, the police had not yet arrived and petitioner did not even know whether her husband would survive. Yet her concern for him was not all-consuming; she also was sufficiently worried about her own predicament to want to consult an attorney. Under these circumstances, the prosecutor was free to argue that the jury should consider the timing of this statement, along with all of the other evidence, in evaluating petitioner's criminal intent.

Nor is there any merit to petitioner's theory that she was exercising her rights when she mentioned the lawyer. Although

petitioner likens the comment in question to comments on a defendant's right to remain silent following his arrest, there is a crucial difference. Once a defendant is arrested, his Miranda rights attach automatically. His subsequent silence can not be penalized, therefore, because it is insolubly ambiguous: he may be doing no more than exercising one of those rights. See Doyle v. Ohio, 426 U.S. 610, 617 (1976). Here, on the other hand, petitioner was not under arrest — and her rights had not attached — when she spoke to the 911 operator. As a result, anything petitioner said to the operator, or perhaps neglected to say, was fair game so long as it tended to show her guilt.

In short, the prosecutor said nothing untoward in making an argument based on



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evidence in the record. No issue in this case is worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 17, 1985